



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-92-12

### FACTS:

You are a member of state regulatory board (Board). You are entitled to a stipend as a Board member, but you have chosen not to accept this compensation.

You are also employed by a private employer. You are a member or officer of several professional associations.

You wish to solicit funds for various political and charitable purposes from Massachusetts residents, some of whom are under the Board's regulatory authority. These purposes include federal and state political campaigns, and your own efforts to obtain positions in professional, charitable, or political organizations.

### QUESTIONS:

1. When may you participate in a Board matter that concerns a professional colleague or a fellow association member?
2. How does G.L. c. 268A limit your political and charitable fundraising activities?

### ANSWERS:

1. If a Board matter could affect in a reasonably foreseeable way the financial interests of your private employer, or a professional association of which you are an officer, you may not participate, unless the Governor exempts you as discussed below. Otherwise, you may participate, but if your ties to a particular professional colleague or fellow association member who comes before the Board are close enough to create a reasonable impression of undue influence, you must disclose this in a public letter to the Governor.

2. You may not solicit from persons under your Board's regulatory jurisdiction, and you may not use any state facilities or resources in your solicitations.

### DISCUSSION:

Even though you do not accept compensation as a Board member, the state conflict of interest law applies to you as a "state employee."<sup>1/</sup>

#### 1. Participation in Board matters

Section 6 of G.L. c. 268A generally prohibits a state employee (unless exempted by his appointing authority)<sup>2/</sup> from participating in any particular matter in which (among others) he, his immediate family or partner, or a business organization in which he is serving as officer, director, trustee, partner or employee, has a direct or foreseeable financial interest. Based on the facts you present, if the financial interest of your private employer, or a professional association of which you are an officer, could be affected in a reasonably foreseeable way, you would be prevented from participating.<sup>3/</sup> The mere fact that the financial interests of your fellow employee or of your fellow member of an association would be affected would not prevent your participation.

However, §23(b)(3) of G.L. c. 268A prohibits a public employee from engaging in conduct that gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his

favor in the performance of his official duties, but allows the employee to dispel any such impression by written public disclosure. If your ties to a particular professional colleague or fellow association member who comes before the Board are close enough to create such a reasonable impression,<sup>4/</sup> you should disclose those ties in a public letter to the Governor (your appointing authority). *See, e.g., EC-COI-89-12, 15, 26.* You would then be free to participate fully.

## **2. Political and charitable fundraising**

### **(a) Solicitations generally**

Section 23(b)(2) of G.L. c. 268A provides that no public employee may use or attempt to use his official position to secure unwarranted privileges of substantial value<sup>5/</sup> for himself or others. The Commission has consistently held that this provision flatly prohibits public employees from soliciting anything of substantial value from persons within their regulatory jurisdiction, because of the “inherently exploitable nature” of these situations.<sup>6/</sup> *See EC-COI-92-7* (canvassing authorities forbidding such solicitation of private business relationships). In *EC-COI-90-9*, the Commission specifically forbade a state official from soliciting political services from his agency’s vendors, even if he did not use official stationery. And *EC-COI-92-2* held that a State Representative could not solicit funds for personal financial purposes from anyone with an interest in legislative business, broadly defined. Therefore, you may not solicit funds for any non-official purpose from any person you know is subject to the Board’s regulatory jurisdiction, even if he or she is a friend or acquaintance of yours.<sup>7/</sup>

Furthermore, even if you are not soliciting persons within the Board’s regulatory jurisdiction, §23(b)(2) prohibits you from using any state facilities or resources (including telephones, office supplies, copying or printing facilities, and the time of state employees), or your title and stationery as a Board member, to solicit funds or to promote a fundraising effort that is not within your official duties.<sup>8/</sup> *EC-COI-92-2; Commission Advisory No. 4 (Political Activity).* You may also not use the state seal or coat of arms for these purposes. *EC-COI-92-5.*

### **(b) Political fundraising**

The Commission now clarifies<sup>9/</sup> that the general solicitation analysis above, which we have previously applied in many other circumstances, also applies to solicitation of political contributions to federal, state, and local candidates and political committees, at least by an appointed public employee.<sup>10/</sup>

Certainly, the language of §23(b)(2) contains no indication that the Legislature intended an exception for “political” solicitations from the statute’s general application. And we have previously applied G.L. c. 268A in related contexts. In *EC-COI-90-9*, we specifically held that §23(b)(2) forbids a state official from engaging in “any campaign activity” with respect to his agency’s vendors.<sup>11/</sup> In *re Nolan*, 1989 SEC 415, we concluded that a mayor violated §§2(b) and 3(b) by promising city firefighters that he would defer scheduling a promotional civil service examination if the firefighters agreed to “support” him in his reelection campaign. A dictum in *EC-COI-84-128* says of §23(b)(2) that “a member of a state regulatory board may not solicit political contributions . . . from businesses subject to the board’s regulation.” (citation omitted)

The legislative history of §23 does not suggest otherwise. It is true that the special legislative commission report that proposed the original version of G.L. c. 268A states that the commission decided “not to include **in the criminal section** related subject matters such as . . . campaign contributions” because that subject “is covered in the Corrupt Practices Act,” G.L. c. 55. Final Report of the Special Commission on Code of Ethics, H. 3650, at 9 (1962) (emphasis supplied). *See Moskow v. Boston Redevelopment Authority*, 349 Mass. 553, 566-67 (1965) (relying on this language to hold campaign contributions to elected officials not within G.L. c. 268A, §§3, 17). But the very statement that the “criminal section” of G.L. c. 268A does not apply to campaign contributions suggests that §23, which then and now contains no criminal sanctions, may well apply.

Furthermore, even these early statements that the criminal provisions of G.L. c. 268A do not apply to campaign contributions have been undermined by subsequent events. First, a federal Court of Appeals, after a thorough analysis, held that provisions of 18 U.S.C. §201 analogous to G.L. c. 268A, §§2 and 3, do apply to campaign contributions under some conditions. *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974). Recognizing that G.L. c. 268A, §§2 and 3 were modeled on this federal statute, the Massachusetts appellate courts have often looked to *Brewster* to aid in their interpretation. *Commonwealth v. Burke*, 20 Mass. App. Ct. 489, 508-09

(1985); *Commonwealth v. Dutney*, 4 Mass. App. Ct. 363, 376 (1976); *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 586 (1976).

Second, in affirming a conviction under §2(b), the Supreme Judicial Court considered the defendant's argument that two cash payments, which the jury apparently believed were the final installment of a kickback arrangement, were instead "legitimate campaign contributions." *Commonwealth v. Borans*, 379 Mass. 117, 142 (1979). The court said:

Campaign contributions to induce public officials promptly to perform their duties are unlawful. Nor can public officials condition the disbursement of government funds on the receipt of "campaign contributions."

*Id.* (citation omitted).

Third, in a related context, the Supreme Judicial Court rejected an argument based on the same passage of the 1962 special commission report quoted above, in which the special commission also stated that "nepotism" was not within the criminal provisions of G.L. c. 268A. Choosing to rely instead on the clear statutory language, the court held that §19 prohibited a municipal official from promoting his brother. *Sciuto v. City of Lawrence*, 389 Mass. 939, 948-49 (1983). In short, whatever small doubt may remain that the criminal provisions of G.L. c. 268A apply to campaign contributions, nothing in this history even suggests that §23 should not apply.

Finally, the Federal Election Campaign Act, 2 U.S.C. §453, does not pre-empt applying §23 to the solicitation of federal campaign contributions by Massachusetts public employees. After examining the federal Act's legislative history, the Federal Election Commission, which is charged with its interpretation, has concluded that it does not pre-empt a state statute "regulating the political activity of a state employee." FEC AO 1989-27 (Dec. 11, 1989).<sup>12/</sup>

We conclude that §23(b)(2) applies to your solicitation of campaign contributions, as well as anything else of substantial value. As discussed above, it prohibits your solicitation from persons under your Board's regulatory jurisdiction, and also prohibits using any state facilities or resources in your solicitations.<sup>13/</sup>

### **Date Authorized: April 13, 1992**

<sup>1/</sup>"State employee" is defined in relevant part as "a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or **without compensation**, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council." G.L. c. 268A, §1(q) (emphasis supplied).

<sup>2/</sup>If any matter (or class of matters, *see EC-COI-90-4; 90-5*) to which a §6 financial interest applies comes before the Board, you must fully disclose it to your appointing authority, the Governor, in writing beforehand, even if you decide not to participate. The Governor may then decide to allow your participation if he determines that this financial interest is not so substantial as will likely affect the integrity of your services to the state. §6(3). Copies of both your disclosure and the Governor's determination must be filed with this Commission.

<sup>3/</sup>[example deleted]. You should seek further advice from us if you have questions about a particular situation, or seek an appropriate exemption from the Governor (see note 2).

<sup>4/</sup>For example, such an impression might arise if your own immediate supervisor, immediate subordinate, a colleague with whom you have a close working relationship, or a close personal friend came before the Board. *See, e.g., EC-COI-89-16*.

<sup>5/</sup>Anything valued at \$50 or more is "of substantial value." *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8 (Free Passes)*.

<sup>6/</sup>General Laws c. 268A, §3(b) also prohibits you from either soliciting or receiving anything of substantial value "for [your]self" from such persons. *EC-COI-92-2*. Because most of your proposed solicitations arguably are on behalf of others, this discussion focuses on §23(b)(2).

<sup>7/</sup>If a solicitation letter you sign is sent to a broad mailing list that you do not control, and is inadvertently received by a person subject to the Board's regulatory jurisdiction, you will not violate §23(b)(2). To the extent that you control the mailing list and are able with reasonable effort to remove the names of persons subject to the Board's regulatory jurisdiction, however, you must take reasonable steps to do so.

<sup>8</sup>We have recognized that state officials may use official resources to solicit funds for public purposes. *EC-COI-84-128* (by Secretary of Public Safety, for state program to combat drug and alcohol abuse); *EC-COI-83-102* (by legislator, for voter registration drive).

<sup>9</sup>We have apparently never been asked this question before, probably because the state campaign finance law, G.L. c. 55, §13, prohibits such political fundraising by appointed persons “employed for compensation” by the government. The state Office of Campaign and Political Finance (OCPF) can provide advice about whether this provision applies to you, in view of your declining the compensation to which you are entitled. Even if OCPF concludes that its statute applies in your circumstances, however, our opinion will have significance for other regulatory board members for whom no compensation is provided; they include, for example, all members of boards of registration (*see* G.L. c. 13, §9, last sentence, added by St. 1990, c. 150, §227) and of many unpaid local boards, such as planning boards, boards of zoning appeals, and conservation commissions.

<sup>10</sup>We need not decide here to what extent this analysis should apply to elected officials. It may well be, however, that solicitation of political contributions is “warranted” under §23(b)(2) in different circumstances for elected than for appointed officials. *See* G.L. c. 55, §13 (exempting elected officials from prohibition against compensated public employees’ soliciting or receiving political contributions); *United States v. Brewster*, 506 F.2d 62, 73 n.26 (D.C. Cir. 1974) (“Every campaign contribution is given to an elected public official probably because the giver supports the acts done or to be done by the elected official”); *United States v. Biaggi*, 909 F.2d 662, 695 (2d Cir. 1990) (line between lawful campaign contribution and illegal gratuity not always clear, citing *Brewster*).

<sup>11</sup>The official apparently could not solicit campaign contributions themselves (as opposed to campaign services) because of G.L. c. 55, §13. *See* n. 9 above.

<sup>12</sup>The state statute under review was, in fact, the first sentence of G.L. c. 55, §13.

<sup>13</sup>As the discussion above makes clear, federal and state campaign finance laws may further restrict your activities. For more information, you should contact the state Office of Campaign and Political Finance, One Ashburton Place, Room 411, Boston, MA 02108, telephone (617) 727-8352; and the Federal Election Commission, 999 E Street, N.W., Washington, D.C. 63, telephone (800) 424-9530.